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THE paper which formed the basis of the present publication was originally prepared for reading before a company of ladies and gentlemen, with the purpose of pointing out in a simple manner, without the use of technical terms, the position reached and now occupied by women, so far as it is different from that of men, under the laws of this Commonwealth. Considerable additions have since been made, and citations have been appended, referring to the various chapters of the State Constitution and of the Public Statutes, and to the decisions of the Supreme Judicial Court, establishing the law as it now exists. It is not, however, offered to the public as a legal treatise, but is simply an attempt to state intelligibly and accurately the rights, privileges, and disabilities of women under the law of Massachusetts, especially so far as they are different from those enjoyed by or imposed upon men.

BOSTON, July, 1884.

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Women under the Law of Massachusetts.

I. ANCIENT LAW AND PAST LEGISLATION.

In order to understand the present law of Massachusetts, as it specially affects men and women in their relations to each other and to the state, it is helpful, if not necessary, to recall the disabilities to which women were subjected in days which are removed, not only by lapse of time, but also by reason of the great changes which the constant advance in civilization has of necessity wrought in the manners and customs of the people, in their relations to each other, and in the relations of state to state. The present legal status of women is far different from what it was under the harder theories and rigors of the common law. A radical change, or, as it might almost be termed, a revolution in their condition has been brought about by the successive statutes of this Commonwealth. While recalling the burdens and disabilities and restraints which were placed upon women in those remote times, it must also be remembered that men, too, in an almost equal degree, suffered from restraints and duties and

burdens which a ruder state of civilization imposed. From those ancient times have come our customs and our laws.

THE COMMON LAW.

What is comprehended under the term, "common law," must be clearly understood, for the common law is the basis upon which rest all our modern laws.

When our ancestors came and settled at Plymouth and in Massachusetts Bay, they did not bring with them any code of laws already compiled for their special use, which would apply in all the complicated questions which were to spring up among them about property and about persons,— as to what should become of a man's property when he died, as to the way in which he could convey his land, as to the power a parent should have over his children, as to what offences should constitute crime, and how crime should be punished, and those innumerable questions which are not yet all answered in the twelve hundred pages of our Public Statutes. As our ancestors were English, they naturally assumed that the laws under which they had lived in England, were in operation in their new home, so far as these would apply to their new circumstances.

The English law was founded upon and made up of old maxims and customs which were repeated and practised previous to the time of printing and history, or, in the solemnity of the legal phrase, "time whereof the memory of man runneth not to the contrary." So, in every matter in relation to which no special law had been made by Parliament, some

maxim or custom of this old unwritten law was invoked to decide it. These maxims and customs began with the sayings and doings of a time when each man was the subject or vassal of a petty king or lord, who assumed to rule over a small piece of territory, who was constantly fighting with the neighboring lord for more territory, and who allotted out the use of the land he assumed to rule over to the men who would help him fight his battles. The best fighters received the most favors. The lord made those customs prevail which best suited his purposes and necessities. His wishes and his needs were the prevailing law of his dominion. In this way, what is termed the common law began; and it grew better as better customs grew up and better times inspired better maxims. This unwritten law, or common law, with the changes and additions made to it by the various Acts of Parliament, was the law of the land. It was the common law, so amended and reinforced, prevailing in England at the time our ancestors settled here, which they had for their law, so far as it would apply, until they also began to change it, in one way and another, by statutes passed by their representatives in council and legislature.

The common law, then, which prevailed as to the relations of men and women, became the basis of the colonial law. It might naturally be expected that the law in force at that early period would hardly suit the requirements of our present gentler and more enlightened and juster views, as, in a similar way, the social relations which exist to-day between men and women in a rough pioneer life, would by

no means correspond to the more refined and delicate social etiquette now prevailing in towns and cities settled a couple of hundred years ago.

It is interesting to recall some of the provisions of the common law at about the time of the coming of the Pilgrims and Puritans to these shores.

While a man was called on constantly to devote his life to the state, and to divide, in unpleasant proportions, his possessions with his lord and his king, it was the son who, to the exclusion of the daughter, received at the death of the father the whole of his father's lands, saddled, however, with the father's obligations to the king and the state. The husband, while his actions were so controlled by his superiors, could turn about and control and correct his wife. The loss of a man was then naturally a more serious matter to the state than the loss of a woman. Therefore, if a man killed his wife, it was the same as if he had murdered a stranger; but if a wife killed her husband, she was punished as if she had slain the king, for she had slain the king's defender, and she was sentenced to be drawn and burned alive as for treason.[1] A husband might be punished, not only for his own offences, but also for most crimes, less than murder and treason, committed by the wife, if done in his presence. The husband took all his wife's personal property, but he was obliged to pay her debts.

Some of the provisions of the common law regarding the mutual relations of men and women and husband and wife, never could come into practice

[1] I Blackstone's Commentaries, 445.

here, as ill-adapted to the temper of our ancestors and to the requirements of a new country; but, generally speaking, the rules of the common law were regarded as binding, and in some cases were even reaffirmed; and they have continued to be in force, except as modified by the statutes which have from time to time established new rules.

EARLY STATUTES.

Some of the first statutes which were passed specially affecting men and women and their relations to each other, are, however, curious and instructive. The first such law, made by the colony of Plymouth in 1633, is certainly a beneficent one, and was the foundation of our present statute authorizing the widow's allowance, as it is termed. It provides that a wife may administer on her husband's estate at his death, and "that in case a man die bankerout, as afore considering the rawnes of the countrey and that small meanes for help and reliefe can yet be afforded by others, and that life must be preserved in the widow, children or both; and considering the cases of persons cannot be alike, but some may require more help, some lesse, it is ordered & determined that whatsoever the Governor and Assistants shall allow the widow and fatherless or motherless in this kind for their prent comfort shall be to them & their comfort, notwithstanding they dare not administer, nor shall they be liable to any paym^{t} to any the creditors of the dec^{d} in respect thereof, provided too great detriment come not to the creditors thereby."

The next law of this kind was, on the other hand, for the benefit of the unmarried women, and was passed in 1638: "Whereas divers persons unfitt for marriage, both in regard of their yeong yeares, as also in regard of theire weake estate, some practiseing the enveagleing of mens daughters and maids under gardians contrary to their parents & gardians likeing, and of mayde servants without leave and likeing of their masters, It is therefore enacted by the Court, That if any shall make any motion of marriage to any mans daughter or mayde servant not haveing first obtayned leave and consent of the parents or master so to doe, shal be punished either by fine or corporall punishment or both at the discretions of the bench and according to the nature of the offence."

A similar but severer provision was enacted by the Massachusetts Bay Colony in 1647, though it gave to the young men, 'whose common practice it is, in divers places, for purposes of marriage irregularly and disorderly to watch all advantages to insinuate into the affections of young maidens in places and seasons unknown to their parents, to the dishonour of God & damage of parties,' immunity if they paid their addresses with the liberty and allowance of the "neerest magistrate."

A statute which was passed by the General Court of the Massachusetts Bay Colony in 1650, cannot be complained of as dealing unequally with husband and wife: "No man shall strike his wife, nor any woman her husband, on penalty of such fine not exceeding ten pounds for one offence, or such cor-

poral punishment as the County Court shall determine."

Special protection was early afforded to women; and in 1711 it was enacted that whosoever should be convicted of assault upon or insolence "to any woman or womankind in the fields, streets, or lanes in any town, or . . . of damnifying or defacing any of their attire or ornaments, or attempting the same," should be punished by being publicly whipped not exceeding ten stripes, or by thirty days' imprisonment, and should give sureties to keep the peace. For a second offence, the offending party might be further punished by burning in the hand.

In providing, in 1703, that no single persons of either sex under the age of twenty-one years should be suffered to live at their own hand, but under some orderly family government, there was inserted a proviso, "that this act shall not be construed to extend to hinder any single woman of good repute from the exercise of any lawful trade or imployment for a livelihood, whereto she shall have the allowance and approbation of the selectmen or overseers of the poor, or the greater part of them, any law, usage, or custom to the contrary notwithstanding."

In these days of political discussion, it is also interesting to note that, in 1696, not only a poll tax of four shillings was imposed upon all males of sixteen years and upwards, except ministers, professors, schoolmasters, and aged and infirm persons, but a poll tax of two shillings each was imposed upon "all single women that live at their own hand, except such as through age or extream poverty, in the dis-

cretion of the assessors, are unable to contribute to the publick charge."

The Plymouth Colony, in 1636, took pains to declare "that inheritance do descend according to the commendable custom of England, and . . . that if the husband die, the wife shall have a third part of his lands during her life, and a third of his goods to be at her own discretion," a statute from which we did not much depart until very recent years.

As early as in 1641, the colonial government of Massachusetts Bay made provision that, when the husband or parents died intestate, the county court might assign to the widow such a part of the husband's estate as they should judge just and equal, and assign to the children their shares, provided that the eldest son should have a double portion,— a material change, as is observed, in the common law, which gave the real estate to the eldest son.

RECENT STATUTES.

The changes were not so great, however, in the earlier periods; but, within the last forty years, the statute amendments have been so many and so radical, that the common law is now but little more than the bare warp, into which the variegated threads of statutes have been woven, giving the tone and color and figure to the completed fabric.

The greater changes began in 1845. The wife was then allowed, by a contract made before marriage, to hold property to her separate use, to receive property by conveyance or devise to her separate use, and to hold such property with the same rights

and liabilities as if she were unmarried; but she could not use the same in trade or commerce.[1] In 1846, her receipt for money earned or deposited by her was made a valid discharge.[2] In 1855, she was permitted to carry on business and to perform labor on her separate account, and to hold her earnings as her separate property; and it was further provided that the property which a woman thereafter married might own at the time of marriage, the profits and proceeds thereof, and the property which should come to her by descent, devise, or bequest, or by gift of any person except her husband, should be her separate property, independent of her husband's control, and not liable for his debts.[3] In 1857, these provisions were extended to the property of all women then married.[4] Other changes have followed fast from year to year, those of 1874 being the most important.[5]

[1] Statutes of 1845, ch. 208. [2] Statutes of 1846, ch. 209. [3] Statutes of 1855, ch. 304. [4] Statutes of 1857, ch. 249. [5] Statutes of 1874, ch. 184.

II. PUBLIC PRIVILEGES AND DISABILITIES.

It is more especially, however, proposed to show, as far as practicable, the status of women both in their public and private relations, especially as it is different from that of men, under the present law of Massachusetts.

VOTING AT ELECTIONS.

The constitution of the Commonwealth gives the privilege of voting at elections for governor, lieutenant-governor, senators, and representatives to the legislature, to every male citizen of twenty-one years of age and upwards (excepting paupers, persons under guardianship, and such persons as are unable otherwise than by a physical disability to read the constitution in the English language and to write their own names), who has resided within the Commonwealth one year, and within the town or district in which he claims the right to vote, six months preceding the election, and who has paid, by himself or his parent, master, or guardian, a state or county tax within the preceding two years, or has been by law exempted from taxation.[1] None others can vote for governor, lieutenant-governor, senators, or representatives; except that no person having served in the United States army or navy in

[1] Arts. of Amendment, III. and XX.

time of war, and having been honorably discharged, shall be disqualified on account of being a pauper, or, if a pauper, on account of the non-payment of a poll tax.[1] The constitution is silent as to the qualifications required for voting for all other officers than those above specified. The legislature may, therefore, by statute define who shall be allowed to vote for other state officers, such as secretary of state and treasurer, for county officers, such as sheriffs, registers of deeds and of probate, and for town and city officers. Under this power, the legislature has given to every woman having the qualifications above specified for male voters, and who has paid by herself, her parent, guardian, or trustee, a state, county, city, or town tax assessed upon herself or her trustee in this state within the preceding two years, the right to vote for members of the school committee.[2] It is to be observed that payment of a tax assessed to his trustee simply, is not sufficient to enable a man to vote, so far as payment of a tax is concerned.

By the constitution of the United States, the same qualifications are required of electors of representatives to Congress as are required by the state to qualify a person to vote for members of the state house of representatives;[3] but the legislature is given the power to prescribe the qualifications required to vote for presidential electors.[4]

Women, therefore, cannot be empowered to vote for governor, lieutenant-governor, state senators,

[1] Art. of Amendment, XXVIII. [2] Public Statutes, ch. 6, § 3. [3] Art. I., § 2. [4] Art. II., § 1.

or representatives, or for representatives to Congress, except by a change in the state constitution, which would require the assent of the legislature for two successive years with a two-thirds vote each year in the house of representatives, and the subsequent affirmative vote of the people. The legislature may, however, by a majority vote in any year, as it has done in the case of permitting women to vote for school committee, enable women to vote for all other state officers, and for all county and town and city officers, and also for presidential electors.

Women, therefore, are now entitled to vote only for members of the school committee.

HOLDING OF OFFICE.

There is nothing in the constitution or statutes of the state which directly prohibits women from holding office; and, although it is regarded as a general rule that officers are to be chosen from the general body of the electors, this rule can hardly be considered imperative without express enactment.

The Supreme Court has given an opinion that a woman cannot be legally appointed a justice of the peace, since a justice of the peace is a judicial officer.[1] Otherwise, no especial reason is given for the decision, except that such decision is supported from the general purport of the constitution, the law previous to its adoption, and the practice since its adoption. All judges and other judicial officers in this Commonwealth must, under the constitution, be appointed by the governor.[2]

[1] Opinion of Justices, 107 Mass. 604. [2] Ch. II., § 1, Art. IX.

The court, on the other hand, has held that, under the constitution, a woman might be a member of a school committee, since the constitution is silent upon the question, and the common law permitted a woman to fill any local office of an administrative character, the duties of which were such that a woman was competent to perform them. The court, also, further declared that the constitution confers upon the legislature full power and authority to provide by law "for naming and settling all civil officers within the Commonwealth, the election and constitution of whom are not in the Constitution otherwise provided for."[1] A statute, also, passed in 1874, permitted women to become members of a school committee.[2]

Still later, in 1881, the court gave an opinion that a woman was not entitled under the statute, as it then existed, to admission as an attorney or counsellor before the courts. It declared that, by the law of England at the time of our separation, no woman, married or unmarried, could take part in the government of the state, and added, more pointedly, that a woman is not by virtue of her citizenship vested by the constitution of the United States, or by that of the Commonwealth, with any absolute right, independent of legislation, to take part in the government, either as a voter or as an officer; and, further, that there is nothing in the action of the legislature or of the judiciary, having any tendency to prove that there has been such a change in the law or the

[1] Opinion of Justices, 115 Mass. 602 (1874). [2] Statutes of 1874, ch. 389.

usage, prevailing at the time of the separation, as to admit women to the exercise of any office that concerns the administration of justice.[1] In the following year (1882), women were permitted by statute to practise as attorneys at law;[2] and, in 1883, authority was given the governor to appoint women, who are attorneys at law, special commissioners to administer oaths and to take depositions and acknowledgments of deeds.[3]

The Supreme Court of Maine, declaring that the constitution of that state is modelled upon that of Massachusetts, and holding that women could not be appointed justices of the peace, assumed that, as the constitution of Maine was adopted by the male inhabitants under their separation from Massachusetts, all the offices created by the constitution are to be filled exclusively by males, but that the legislature can create new ministerial offices, not enumerated, to be filled by either sex.[4]

It would seem, therefore, that women cannot, without a change in the constitution, hold offices which are established by the constitution, or which would entitle them to take part in the government of the state itself, or would give them the exercise of judicial powers; but that they may, by vote of the legislature, be appointed or elected to other offices;[5] and it is probable that, without legislative authority, they may be elected or appointed to offices of simply a local administrative character, such as women are

[1] Robinson's case, 131 Mass. 376. [2] Statutes of 1882, ch. 139. [3] Statutes of 1883, ch. 252. [4] Opinion of Justices, 62 Me. 596, et seq. [5] Leonard's case, 136 Mass.

ordinarily competent to fill. They are elected, without special statute authority, overseers of the poor, and probably to some other offices, and are in some cases appointed without distinct legislative authority, upon charitable, educational, and reformatory boards.

It should be noted that, under the constitution, no person, male or female, is eligible to office in the Commonwealth who is not able to read the constitution in the English language and to write his name, excepting, however, as in the case of voting, persons prevented by physical disability from complying with these requisitions and persons having the right to vote or being of sixty years of age and upwards on the first day of May, 1857.[1]

TAXATION.

Women are freed from certain disabilities or duties to which men are subject. They are not obliged to pay a poll tax unless they qualify for voting, and then a sum not exceeding fifty cents is required.[2] Every male inhabitant above the age of twenty, whether voting or not, except certain persons who are excused or unable to contribute by reason of age, infirmity, or poverty, is obliged to pay a poll tax not exceeding two dollars; and the payment of an amount not exceeding one dollar is made a pre-requisite for voting.[3]

Taxes are imposed alike upon the property of males and females, except that the property of a

[1] Art. of Amendment, XX. [2] P. S., ch. 6, § 9. [3] P. S., ch. 11, §§ 1, 5, 48. Art. of Amendment of Constitution, III.

widow, or unmarried woman above the age of twenty-one years, to the amount of five hundred dollars, is exempt, if her whole estate does not exceed one thousand dollars exclusive of property otherwise exempted by law.[1]

MILITARY AND JURY DUTY.

Except paupers, common drunkards, vagabonds, persons mentally incompetent or convicted of infamous crimes, Quakers and Shakers having conscientious scruples against bearing arms, and except certain persons who are exempt on account of the holding of office or on account of the nature of their employment, every able-bodied male citizen, between the ages of eighteen and forty-five, is enrolled in the militia, and subject to be called into active duty in the field in case of war, invasion, riots, and in aid of the execution of the laws of the Commonwealth.[2]

With similar exceptions, all qualified to vote are liable once in three years to be drawn and to be compelled to serve upon the jury,—which can hardly be regarded, considering the small sum paid for their services, to be otherwise than as a public duty and hardship, so far as the majority of jurors are concerned.[3]

ARREST FOR DEBT.

Except in actions for tort,— that is, for trespass, wrongful conversion of property, and other wrongful

[1] P. S., ch. 11, § 5. [2] P. S., ch. 14, §§ 1–6. [3] P. S., ch. 170, §§ 1–3.

acts for which penalties in money are imposed,—women are exempted from the operation of statutes which authorize an arrest of the person in civil actions, before a judgment is obtained and execution is issued by the court.[1]

SETTLEMENT.

While, in general, a man having no settlement within the state can acquire such settlement in any city or town, so as to become entitled to relief from the city or town, in case of poverty or need, by paying all the taxes assessed upon him for three out of five successive years of residence, a woman acquires a settlement in any city or town, not only through her husband's settlement, but also, whether married or single, by her own residence for five years together, without any such obligation.[2]

NATURALIZATION.

The United States statutes which regulate the subject of naturalization, provide that any woman who is now, or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.[3] It has been held under this statute, which was passed in 1855, that any woman who was "a free white person," and not an alien enemy, becomes a citizen, and entitled to all the rights and privileges of citizenship, by marriage with a citizen, or by the nat-

[1] P. S., ch. 162, §3. [2] P. S., ch. 83, § 1. [3] U. S. Stat., § 1994.

uralization of her husband, if he was before an alien. Not only is she not required in such case to take any action herself, but her assent to citizenship is not necessary, and even she may never herself have resided in the United States.[1] The restriction to being a "free white person" is of course now done away with.[2] Consequently, an alien woman by marrying a citizen, or by the naturalization of her husband, becomes entitled to vote for school committee in Massachusetts, upon a single year's residence and payment of tax.

MAJORITY AND AGE OF CONSENT TO MARRIAGE.

The popular belief that a female becomes "of age," or reaches her majority, so that her acts are binding, at the age of eighteen rather than of twenty-one, the period at which a male reaches his majority, is incorrect, the chief difference between males and females in this respect being that a female may contract a valid marriage, even without the consent of her parents, at the age of twelve, and a male at the age of fourteen years.[3] The city or town clerk is, however, liable to a penalty, if he issues a marriage certificate, having reasonable cause to believe the female to be under the age of eighteen years or the male to be under the age of twenty-one, without the consent of the parent, master, or guardian of such person; and a magistrate or minister is pro-

[1] Kelly *v.* Owen, 7 Wallace, 496. See also Burton *v.* Burton, 1 Keyes, 359, opinion of Wright, Judge. [2] U. S. Stat., § 2169, as amended. [3] Parton *v.* Hervey, 1 Gray, 119.

hibited, under penalty, from marrying parties when he has reasonable cause to believe the male to be under the age of twenty-one years or the female to be under the age of eighteen years, provided there is any such parent, master, or guardian within the Commonwealth competent to act.[1]

[1] P. S., ch. 145, §§ 18, 6.

III. PROPERTY.—RIGHTS AND DISABILITIES OF MARRIED WOMEN.

The above, it is believed, are substantially all the inequalities or differences made by the statutes between males and females as such.

The most of the differences made by the statutes are those affecting husband and wife only; and, aside from suffrage, the most of the so-called disabilities of which complaint is made, are those to which married women alone are subject.

HOLDING OF PROPERTY.

The legal status of married women was fixed by the common law, as has been said, and on the theory that the husband and wife were one person, "the very being and legal existence of the wife," says Blackstone, "being incorporated into that of her husband, under whose wing and cover she was supposed to do everything; whence she was called *feme covert*," and her legal status her coverture. From this theory can be traced nearly all the existing disabilities of married women. Yet the very disabilities which the common law laid upon the wife were, for the most part, intended, says Blackstone again, in his Commentaries, for her protection and benefit, "so

great a favorite is the female sex of the laws of England"![1]

Under the common law, the husband had the control and income of the real estate, and the management and disposal, if he chose to exercise it during her life, of the personal estate which was the wife's at the time of her marriage, and which came to her during her marriage; and she could hardly do any act in relation to her property during his life, at least without his consent and joining with her. All this, however, is changed by the statutes of Massachusetts.

A married woman may now hold, as her separate property, free from the control and interference of her husband, whatever real or personal property she has at the time of her marriage, or whatever comes to her during marriage, or whatever she acquires by business or labor carried on or performed by her on her separate account, with the rents and income of all such property.[2] As has been declared by the court, she may now hold her separate property in the same manner as if she were sole, with the same rights and privileges, and subject to the same rules, responsibilities and liabilities as a single woman.[3]

To this general rule there is, perhaps, one exception. It would seem that if real estate is given or conveyed to the husband and wife jointly, which is infrequent, the husband would have, while both were living, the entire control and income of the estate;

[1] I Blackstone, 442, 445. [2] P. S., ch. 147, § 1. [3] Pacific National Bank *v.* Windram, 133 Mass. 175.

but, at the death of either, the estate would become the entire and absolute property of the other.[1]

While it is the *separate* property of a married woman over which she is given entire power, it is difficult to see what property there is which any married woman may not now hold separately, except such property as women married before the passage of the statute of 1855, received before their marriage. Such property would be subject to the rules of the common law.

It is, however, as is seen, necessary that a wife should keep the money and other personal property which she receives, separate and distinguishable from that of her husband. She cannot hold such property against his creditors and heirs, if she allows it to be so mixed with his, that it cannot be ascertained and separated.[2] If a married woman buys articles of furniture, for instance, partly with her own money and partly with her husband's money, and does not discriminate from the rest and hold a part as her own, and there is nothing in any of the articles to indicate that they were for her exclusive use, or other indication that she has exclusive right to a part of them, she cannot claim any part.[3]

It is expressly provided that wages due on account of the personal labor or services of the wife cannot be taken under the trustee process in a suit against the husband.[4]

[1] Wales *v.* Coffin, 13 Allen, 213, 215; Pierce *v.* Chace, 108 Mass. 254, 258. [2] McCluskey *v.* Provident Institution for Savings, 103 Mass. 300. [3] Kelly *v.* Drew, 12 Allen, 107. [4] P. S., ch. 183, § 29.

As to wearing apparel, if articles of clothing and personal ornament are purchased, not with her own money or earnings, but with her husband's earnings, or upon his credit, the fact that they are selected and purchased by her, and intended for her personal and exclusive use, does not render them any the less his property. Though the husband and wife work together, while she may keep her earnings separate, if she sees fit to do so, if she allows them to be mingled with her husband's, and if her clothing is purchased with money from the common fund, such clothing becomes her husband's property. She receives the money to buy clothing and expends it, as his agent, in payment of articles which he is bound to supply, under his legal obligation to support and clothe her as his wife.[1] However, the necessary wearing apparel of the wife and children are by statute exempted from attachment by the husband's creditors;[2] and, after his death, the widow's articles of apparel and ornament are made to belong to her.[3]

It seems still to be the case that, in order that the wife may hold her property free from her husband's control and from his creditors, it must appear affirmatively that she acquired it as her separate property, and that the common law presumption still remains, nothing appearing to indicate the contrary, that personal property or money in the possession of the wife belongs to the husband, and as such is subject to his disposal, and can be taken on attachment or

[1] Hawkins *v.* Providence & Worcester R.R. Co., 119 Mass. 596.
[2] P. S., ch. 171, § 34. [3] P. S., ch. 135, § 1.

execution by his creditors. Upon this presumption, it was held that a thief who stole a purse from the pocket of a married woman, in the absence of any further evidence in regard to the ownership, must be charged as having taken the property, not of the wife, but of the husband.[1]

The property of a married woman is relieved, to a certain extent, from the operation of the Statute of Limitations. While, in general, no person can take possession or bring any action for the recovery of his lands after the expiration of twenty years from the time when the right to enter or recover first accrued to him, or to the person from whom he claims, a married woman can take such possession or bring such action at any time within ten years after the dissolution of the marriage by the death of the husband, though the twenty years have previously expired.[2]

An extraordinary protection is afforded by statute to married women in relation to life insurance policies. It is provided that a policy of insurance for the life of a person, expressed to be for the benefit of a married woman, or assigned or made payable to her or in trust for her, whether procured by her, her husband, or any other person, or assigned to her by her husband or by any other person, shall inure to her benefit and that of her children, independently of her husband or his creditors, or of the person effecting or transferring the policy or his creditors.[3]

[1] Commonwealth *v.* Williams, 7 Gray, 337. See also Marshall *v.* Jaquith, 134 Mass. 138. [2] P. S., ch. 196, § 5. [3] P. S., ch. 119, § 167.

It has been expressly provided by statute that on the petition of a married woman having separate property, a trustee may be appointed by the court to hold the same upon such trusts as she may declare in conveying the property to him; and the trustee may prosecute or defend any suit in relation to such property brought by or against her.[1]

ENGAGING IN BUSINESS ON SEPARATE ACCOUNT.

If a wife is doing business on her separate account, in order that the property employed in such business shall not be liable to be attached by her husband's creditors, nor to be taken by them on execution against him, she must record a certificate of the fact of so doing business in the office of the city or town clerk. If the wife neglects to record such certificate, the husband may do so. In case no certificate is recorded by either husband or wife, the property employed in such business is liable to be attached and taken as the property of the husband; and the husband will be liable upon all contracts lawfully made in the prosecution of the business, the same as if such contracts had been made by himself.[2]

The statute does not in any way impair the right of a married woman to do business on her separate account, or relieve her from liability on account of her contracts. The question whether in such case the business, or the property employed in such business, is the husband's or the wife's, is often embar-

[1] P. S., ch. 147, § 13. [2] P. S., ch. 147, § 11.

rassing and complicated.[1] The object of the statute is to simplify the matter by compelling such a definite statement, and thus, as has been stated by the court, to afford the means of ascertaining in which of the two persons, apparently in the possession and use of property in carrying on trade or an occupation, the title is vested, so that all having occasion to transact business with either may regulate their dealings accordingly.[2] The recording of the certificate protects the wife's property from the risk of attachment by creditors of her husband, and relieves him from all liability on her contracts.

The statute is not confined in its application to cases in which a married woman engages in trade, in the ordinary sense of the word, or in the manufacture of goods for sale; but it includes any business on her sole account by which she supports herself and her family, and which is carried on with funds and other means belonging to her. The carrying on of a farm and the keeping of a boarding-house for the support of the family have been held to be occupations coming within the application of the statute. On the other hand, it is stated that there may be uses of the property of a married woman on so small and trivial a scale as not to come within the meaning of such a separate business; and the use of a horse and carriage, the procuring of stabling for the horse or repairs for the carriage, the raising of crops for her own use on her own land, the erection or repair of her dwell-

[1] Feran *v.* Rudolphsen, 106 Mass. 471. [2] Chapman *v.* Briggs, 11 Allen, 546.

ing-house, the purchase of materials and furniture for herself and family, are all enumerated as uses of property not amounting to a separate business within the intent of the statute.[1]

It is only the personal property of a married woman, and not her real estate, which is thus liable to be attached or to be taken on execution by her husband's creditors.[2] Debts due on account of the business, as, for instance, from boarders to a married woman who is keeper of a boarding-house, are considered a part of the property employed in such business, and therefore liable to be taken by her husband's creditors.[3]

The statute will not apply to the case of a married woman doing business in this Commonwealth, whose husband was residing and had a domicile in good faith in another State.[4]

The failure to file such certificate does not give the husband any authority to dispose by sale or mortgage of the separate property of the wife employed in such business, or to impose any other lien thereon in favor of his creditors.[5]

CONTRACTS.

A married woman may make a contract so that her property will be held for its fulfilment, and so that she can enforce it at law, with any one other

[1] Snow *v.* Sheldon, 126 Mass. 332. Proper *v.* Cobb, 104 Mass. 589. [2] Bancroft *v.* Curtis, 108 Mass. 47. [3] Dawes *v.* Rodier, 125 Mass. 421. [4] Hill *v.* Wright, 129 Mass. 296. [5] Merrill *v.* Parker, 112 Mass. 250.

than her husband; and, except as to her husband, she may sue and be sued the same as if she were single.[1] Any work or labor which she performs for any one other than her husband and children, is, unless there is an express agreement on her part to the contrary, to be presumed to be performed on her own or separate account; and she, and not her husband, is entitled to collect the payment for any such labor.[2]

The husband will not be bound by, nor will his property be held liable for any contracts made by his wife in respect to her separate property, business or services, except in the case of his or her failure to record a certificate as before set forth, when she does business on her separate account.[3]

The statutes in enlarging the capacity of a married woman to hold and deal with property, and in removing many of the disabilities under which she was placed by the common law, have not conferred upon the husband and wife new powers to contract with each other, or to transfer property to each other (except by the husband to the wife to a limited amount), nor have they authorized suits between husband and wife. They are not allowed to complicate the common law theory that they are one, by suing each other or by making any contract with or sale to each other.[4] The wife, though she may become a partner with others, cannot enter into a business partnership with her husband or with a firm

[1] P. S., ch. 147, §§ 2, 7, 10. [2] P. S., ch. 147, § 4. [3] P. S., ch. 147, §10. [4] P. S., ch. 147, §§ 2, 3, 7; Atlantic Bank *v.* Tavener, 130 Mass. 407, 409; Fowle *v.* Torrey, 135 Mass. 87, 89.

of which her husband is a member;[1] and neither can make a personal contract with a partnership of which the other is a member.[2] The husband and wife may, however, make a joint contract with a third person.[3] If a wife lends her husband money, she cannot collect it from him, though he repeatedly promises to repay it;[4] nor will the promissory note given by one to the other be of any legal effect.[5]

This disability to contract with each other would, however, not prevent the husband from returning to the wife any money previously placed by her in his keeping; and such return would not be held a gift, and could not be invalidated by the husband's creditors, if made without any fraudulent intent.[6] A husband may, in payment for money loaned him by his wife, give a note to a third person to hold for his wife's benefit; though, if the note were given directly to her, it would be invalid; or, if such third person should indorse the note to the wife, it would be extinguished.[7] If a husband or wife erect buildings upon, or otherwise improve, the land belonging to the other, no recompense can be obtained, or right gained, by the one who so improves the land of the other.[8]

If a man and woman should make a contract with each other, except a contract for marriage or in the nature of a marriage settlement, and then inter-

[1] Plumer *v.* Lord, 5 Allen, 460; Lord *v.* Parker, 3 Allen, 127; Edwards *v.* Stevens, 3 Allen, 315. [2] Fowle *v.* Torrey, 135 Mass. 87, 93. [3] Major *v.* Holmes, 124 Mass. 108. [4] Bassett *v.* Bassett, 112 Mass. 99. [5] Ingham *v.* White, 4 Allen, 412. [6] Snow *v.* Paine, 114 Mass. 520, 525. [7] Degnan *v.* Farr, 126 Mass. 297. [8] Washburn *v.* Sproat, 16 Mass. 449

marry, the marriage would make the contract void.[1] Consequently, if, for instance, a note is given or a loan is made by one to the other before marriage, the note will become void and the loan settled by the marriage.[2]

The husband can act as agent for his wife in buying and selling for her, and in other transactions. He can thus take her money and buy property for her, and receive it in her name.[3] Of course, the wife can in the same manner act as agent for her husband.

It is, however, often difficult to distinguish cases in which one acts as agent for the other, from those in which it is attempted to make contracts with each other or gifts from one to the other. In a case in which a husband purchased certain property in his wife's name, and paid for it partly with her money and partly with his own, it was held that, notwithstanding he so paid a part of the price, he acted as her agent, and the property was hers.[4] Such property will not be subject to attachment by the husband's creditors. It must appear that the wife's money was paid for the purpose of purchasing the property for her, and not that it was simply advanced to him to help make up the consideration he was to pay.[5]

It has even been held that, if a husband sends his wife money, and directs her to purchase a house and to take the deed in her name, so that if misfortune

[1] Miller *v.* Goodwin, 8 Gray, 542. [2] Abbott *v.* Winchester, 105 Mass. 115. [3] McCowan *v.* Donaldson, 128 Mass. 169; Merrick *v.* Plumley, 99 Mass. 566. [4] McCowan *v.* Donaldson, 128 Mass. 169. [5] Snow *v.* Paine, 114 Mass. 520.

comes to him she may have a home, still the house will belong to her, except, of course, as against his creditors.[1]

GIFTS BETWEEN HUSBAND AND WIFE.

It is laid down as a general rule that a husband and wife cannot make valid gifts to each other; but this is not strictly true, even with the statute exception.[2] The statutes now provide that a wife may receive from her husband as a gift, and to be held as her separate property, wearing apparel, articles of personal ornament, and articles necessary for her personal use, to a value of not more than two thousand dollars, if such gift is not made by the husband in fraud of his creditors.[3] There is no such statute exception in favor of the husband. A husband can further make a gift of personal property to his wife which will after his death give her a right to it as against his heirs; it must in such case be clearly shown that he made an actual delivery of the property to her with the intention to give it to her, that she continually retained it separate and distinct from the other property of the husband, and the rights of the husband's creditors must not be impaired by the gift. He may, however, take back the property at any time during his life, his creditors may attach it as his property, and she can maintain no suit at law in her own name regarding it;[4] and at his death the property may be taken to satisfy his debts, if his

[1] Cairns *v.* Colburn, 104 Mass. 274. [2] P. S., ch. 147, § 3. See also Statutes of 1884, ch. 132. [3] P. S., ch. 147, § 3. [4] Marshall *v.* Jaquith, 134 Mass. 138.

other property is insufficient therefor.[1] The case is the same, although the husband, instead of giving directly, deposits money belonging to himself in a savings bank or takes certificates of stock or promissory notes in her name.[2] Similar principles seem to apply in case of gifts from the wife.

The common law also permitted a husband and wife, as well as others, to make to each other a *donatio causa mortis*,— that is, a gift under the solemnity of the contemplation of impending death, not only from existing sickness or injuries, but also, it appears, from other causes, as battle or dangers by sea.[3] Such gifts are recognized under our laws.[4] Only specific articles can be so given, and there must be an actual delivery of them. The gift can be revoked by the giver, and, in fact, is revoked by his recovery from sickness or escape from the threatening peril; and it can, notwithstanding, be taken, if necessary, for the payment of the debts of the giver after his decease.[5]

CONTRACTS AND GIFTS IN EQUITY.

It is necessary to add that there are certain transactions in the nature of gifts and contracts between husband and wife, which are treated as of no effect in the ordinary courts of law, but which may be enforced by the courts sitting in equity. Under the

[1] Spelman *v.* Aldrich, 126 Mass. 113. [2] McCluskey *v.* Provident Institution for Savings 103 Mass. 300; Towle *v.* Towle, 114 Mass. 167; Fisk *v.* Cushman, 6 Cush. 20. [3] II Blackstone, 514. [4] Whitney *v.* Wheeler, 116 Mass. 490. [5] Marshall *v.* Berry, 13 Allen, 43.

later common law, the wife had certain limited rights, particularly under trusts, created by the English Court of Chancery, which she could enforce in those courts, even against her husband, though such rights were not recognized in the courts of law. These rights, not having been taken away by our statutes, will be recognized by our courts in equity; and it may be contended further that the legislature, in permitting a married woman to hold substantially all her property separately, intended to give her also the remedies formerly attaching in chancery or equity for protecting it from the wrongful acts and possession even of her husband.[1]

As has been previously stated, if the wife places money belonging to herself in her husband's hands, in the absence of anything to indicate the contrary, it is supposed that it is put in his hands with the intention that he may use it for the benefit of either or both at his discretion; and there is no presumption that the money is to be repaid by him.[2] If, however, it can be shown that she gave the money to him for him to invest it for her, or with it to purchase certain property, the court may hold that he received the money as a trustee, and that the property purchased belongs to her and not to him, and in equity compel the property to be transferred to her. The husband may thus expressly or by simple implication be a trustee for the wife, or the wife for the husband; and in equity, for many purposes, notwithstanding what is usually laid down, the hus-

[1] Fowle *v.* Torrey, Field, Judge, 135 Mass. 87. [2] Jacobs *v.* Hesler, 113 Mass. 157.

band and wife are regarded as distinct persons, and capable of contracting at least indirectly with each other.[1]

Under these principles, it was held, in a case in which the wife released her dower in her husband's lands on his verbal promise that he would transfer to her certain shares of stock of equivalent value, that the husband, after her release of the dower, held the shares as her trustee, so that a court of equity would enforce the promise, and that his transfer to her, even after he became insolvent, would be good against his creditors.[2] Under the same circumstances, it was held that a verbal promise by the husband to convey real estate to the wife could not be enforced in a court of law, and that a conveyance of land so made would be void as against creditors.[3]

If a wife loan her husband money, though she can neither in a court of equity nor law compel him personally to repay it, yet such a loan will be a sufficient consideration to make valid, even against his creditors, a conveyance of property through a third person by him to her;[4] and she can maintain a claim against his estate in bankruptcy for money so lent.[5]

It has seemed proper to give at some length the above cases, involving more or less transactions between husband and wife and their powers to act in

[1] Atlantic National Bank *v.* Tavener, 130 Mass. 407; Holmes *v.* Winchester, 133 Mass. 140; Walker *v.* Walker, 9 Wallace, 743. [2] Holmes *v.* Winchester, 133 Mass. 140. [3] Holmes *v.* Winchester, 135 Mass. 299. [4] Atlantic Bank *v.* Tavener, 130 Mass. 407. [5] *In re* Blandin, 1 Lowell, 543; Fowle *v.* Torrey, Field, Judge, 135 Mass. 87, 95.

relation to their property, not as affording instances of differences or inequalities, the rights of husband and wife being generally the same, but because such transactions, unfortunately for the parties, are of frequent occurrence, and lead to unexpected hardships, and sometimes to complaints, as if the law in this regard bears unequally upon the wife.

CONVEYANCE OF PROPERTY.

A husband cannot convey any real estate directly to his wife, nor a wife directly to her husband; and a deed purporting to do this would be void. The same object is, however, accomplished by one making a deed to a third person and the third person to the other, or, indeed, by one making a deed to a third person "to the use of" the other.

A married woman may by deed during her life convey to others than her husband all her real estate without her husband's assent or joining in the deed; but the husband in such case will be entitled, notwithstanding, if he survives her, to the entire use and income of the real estate during his life, provided a child has been born alive during their marriage. This interest for life in his wife's real estate, if a child has been born alive during marriage, is called the husband's curtesy.[1] On the other hand, if a husband makes a deed of his real estate without his wife's joining in the deed, or her release, she will still, in case she is the survivor, be entitled to her dower, that is, to the use and income

[1] P. S., ch. 147, § 1.

of one-third of such real estate during the rest of her life, whether they have had any child or not.[1]

In case a sale is made of the real estate of either husband or wife, and one of them is insane or otherwise under guardianship, provision is made by statute, by which the guardian of the ward may unite with the other in conveying the interest of the ward in such real estate; and, in such case, further provision is made for the reserving and investment of such portion of the proceeds of such sales as should properly come to the wife.[2]

Both husband and wife can during life give, sell, or otherwise dispose of all his or her personal property to others, without hindrance or restriction.[3]

HOMESTEAD RIGHTS.

The homestead statute has given some privileges to both husband and wife, but especially to the wife, which should be mentioned.

Every householder having a family is entitled to an estate of homestead, to the extent of eight hundred dollars, in the land and buildings owned and occupied by him as a residence, provided that his design so to hold it has been previously set forth and recorded in the registry of deeds. This estate will continue, not only during the life of such householder, but at his death, for the benefit of his wife and minor children, if one of them occupies the premises, until the youngest child is twenty-one

[1] P. S., ch. 124, §§ 3, 6. [2] P. S., ch. 147, §§ 16–25; ch. 139, § 16. [3] Marshall *v.* Berry, 13 Allen, 43.

years of age, and until the marriage or death of the widow. Such estate, when once acquired, cannot be attached or taken for the payment of the debts of such householder during his life, or be sold for the payment of his debts or legacies after his decease. No conveyance, by the householder, of property in which such a right of homestead exists, will release his right, or that of his wife or children, unless the wife joins in the deed for the purpose of releasing it. In case the property of the householder is taken from him by an execution or by his insolvency, or conveyed by him without his wife's consent, this estate of homestead remaining may be set apart by the court from that so belonging to the creditors or grantee of the householder.[1]

The estate of homestead gained in one place is lost by the acquiring elsewhere, in accordance with the statute, of a new homestead, but is not lost during the life of the householder by an abandonment of the homestead as a residence or by any act of his other than a deed made as above stated.[2] A wife cannot by her separate act divest her husband of his right of homestead once acquired; and he, if still occupying the premises, does not lose his right by a divorce or by the death or absence of his wife or children; others may be adopted as members of his household and his right of homestead is retained.[3]

The will of a householder having such right of

[1] P. S., ch. 123. See also Silloway *v.* Brown, 12 Allen, 30. [2] Woodbury *v.* Luddy, 14 Allen, 1. [3] Doyle *v.* Colburn, 6 Allen, 71.

homestead, cannot deprive his widow or children of such interest; and, if he dies without leaving a will, his heirs will take his real estate subject to such homestead right. The homestead can then be set apart from the rest of the property of the deceased in like manner as the widow's dower, and is additional to the dower interest of the widow and all her rights in the real and personal property of her deceased husband.[1] The title to such estate of homestead, after the death of the husband, is in the widow so long as she remains unmarried and in such children as are minors, and neither can convey away his part without the assent of the others; but the right of possession and enjoyment is in those only who remain in occupation of the homestead.[2] The widow has been held, however, so to occupy the homestead estate as to retain it under the statute, though she leases a part of it, or even only uses a room in the house for the storing of furniture.[3]

Whether a widow having children would originally acquire a homestead under the statute, as a householder, is undecided; but it has been held, in the case of an unmarried woman owning her residence and occupying it with her mother, that the statute giving the right of homestead would not embrace an unmarried woman having no children.[4]

[1] Monk *v.* Capen, 5 Allen, 146; Cowdrey *v.* Cowdrey, 131 Mass. 186. [2] Abbott *v.* Abbott, 97 Mass. 136. [3] Mercier *v.* Chace, 11 Allen, 194; Brettun *v.* Fox, 100 Mass. 234. [4] Woodworth *v.* Comstock, 10 Allen, 425.

The rights of a husband to his wife's property at her death, when he is the survivor, are considerably different from the rights which a wife has in her husband's property at his death, if she survives him.

In the first case, suppose that the husband dies before the wife, and leaves no will. If he leaves issue, children or grandchildren, the widow will have her dower in all his real estate; that is, she will be entitled to the use and income during her life of one-third of all the real estate he owned at the time of his death (except wild lands) and of all other real estate which he has possessed at any time during marriage, and which he has conveyed away without obtaining her release of the same. All this dower estate will go to his and not to her heirs at her death. If he leaves no issue, then the wife will take all his real estate in fee — that is, to own absolutely — up to the amount of five thousand dollars in value; and, if he leaves a greater amount than five thousand dollars, she will have the use and income, but for her life only, of one-half of all the rest of the real estate he owned at his decease in excess of five thousand dollars in value; or, if she so elects, she may take her dower (that is, one-third) in the excess, including what he has conveyed away in his lifetime without her release. If the husband dies and leaves no kindred at all, the wife will inherit all his real estate absolutely. She can, in any event, remain in the husband's house forty days after his death without paying rent,[1]

[1] P. S., ch. 124, §§ 3, 4.

with the use and enjoyment of the furniture and such provisions and other articles as are necessary for the reasonable sustenance of the family;[1] and she may further, to a reasonable extent, expend for her support during that period the money left by her husband.[2]

From the personal estate of the husband, articles of apparel and ornament belonging to the widow and children will first be allotted them; and the judge of the Probate Court may, in his discretion, and frequently does, make a further allowance out of the personal estate to the widow for the support of herself and the family under her care, according to the circumstances of the case, which will be given her, even in preference to the demands of creditors of the estate, although the estate may be insolvent. If he dies leaving issue, she will receive one-third of the remainder of his personal estate. If he leaves no issue, then she will be entitled to all the personal estate so remaining to the extent of five thousand dollars and one-half of any excess above ten thousand dollars.[3]

If the husband dies leaving no kindred at all, the widow will undoubtedly take all the husband's personal estate, though by an error of revision the Public Statutes failed to re-enact the former provision to this effect.[4]

Suppose, on the other hand, that the wife dies

[1] P. S., ch. 135, § 2. [2] Fellows *v.* Smith, 130 Mass. 376. [3] P. S., ch. 135. [4] See P. S., ch. 135, § 3, clauses second and sixth; ch. 124, § 3; Gen. Stats. (1860) ch. 94, § 16, clause third; ch. 91, § 1, clause eighth.

before the husband, and leaves no will. If they have had issue born alive, and if either any such issue or any issue of the deceased wife by a former marriage are living, the husband will be entitled as tenant by the curtesy, so called, to the use and income during his life of all the real estate belonging to the wife at her decease. If they have had issue born alive and she leaves no issue either by their marriage or by a previous marriage, then he will take all the real estate she leaves, to own absolutely, up to the amount of five thousand dollars in value, and will have as tenant by the curtesy the use and income for his life of all the excess of her real estate above the amount of five thousand dollars. In either of these cases, he will, in addition, have the use and income for his life of any other real estate which she owned at any time during marriage, but conveyed away without his release of his right of curtesy. If the husband and wife have had no issue born alive, and she dies leaving issue by a former marriage, he will take the use and income for life of one half of all the real estate she owned at the time of her decease; but if, in such case, she dies leaving no issue at all, then he will take all her real estate absolutely to the amount of five thousand dollars in value, and the use and income for life of one half of all the excess above that amount. At his decease, all the real estate he has held for life only will go to her heirs. If she leaves no kindred at all, he will take all the real estate belonging to her at her decease absolutely; and he will have, in addition, if they have had issue born alive, his cur-

tesy or right for his life to the use and income of any other real estate which she owned at any time during their marriage and conveyed away without his release.[1]

If the wife dies leaving issue, the husband surviving will receive one-half of her personal estate; but, in case she leaves no issue, then he will receive the whole of her personal estate.[2]

The *usual* differences in respect to the descent and distribution of property, between the rights of husband and wife, may perhaps be illustrated and better understood by the following table, giving side by side the different rights acquired in the property of the other, accordingly as the husband or wife be the survivor. The actual shares are also given upon an assumption that the deceased was possessed at the time of death of ten thousand dollars in real estate and ten thousand dollars in personal estate.

If they have had issue born alive and any such issue are living,

Husband surviving takes:	Wife surviving takes:
All wife's real estate for life;	One-third of husband's real estate for life;
One-half of her personal estate absolutely;	One-third of his personal estate absolutely;
	Allowance, if any, even in preference to creditors;
	Forty days' maintenance;
or, in assumed values,	or, in assumed values,
$10,000 of real estate for life;	$3,333.33 of real estate for life;
$5,000 of personal estate absolutely.	$3,333.33 of personal estate absolutely;
	Allowance and maintenance.

[1] P. S., ch. 124, § 1; ch. 147, § 1. [2] Statutes of 1882, ch. 141; P. S., ch. 135, § 3.

If they have had issue born alive, but no issue whatever are left,

Husband surviving takes:
- All wife's real estate absolutely up to $5,000 in value, and remainder of real estate for life;
- All her personal estate absolutely;

or, in assumed values,
- $5,000 of real estate absolutely;
- $5,000 of real estate for life;
- $10,000 of personal estate absolutely.

Wife surviving takes:
- All husband's real estate absolutely up to $5,000 in value, and one-half of remainder for life, or dower in remainder;
- All his personal estate up to $5,000, and one-half of excess above $10,000 absolutely;
- Allowance and maintenance;

or, in assumed values,
- $5,000 of real estate absolutely;
- $2,500 of real estate for life;
- $5,000 of personal estate absolutely;
- Allowance and maintenance.

If they have had no issue born alive, and neither leaves issue by any other marriage,

Husband surviving takes:
- All wife's real estate absolutely up to $5,000 in value, and one-half of remainder for life;
- All her personal estate absolutely;

or, in assumed values,
- $5,000 of real estate absolutely;
- $2,500 of real estate for life;
- $10,000 of personal estate absolutely.

Wife surviving takes:
- All husband's real estate absolutely up to $5,000 in value, and one-half of remainder for life, or dower in remainder;
- All his personal estate up to $5,000, and one-half of excess above $10,000 absolutely;
- Allowance and maintenance;

or, in assumed values,
- $5,000 of real estate absolutely;
- $2,500 of real estate for life;
- $5,000 of personal estate absolutely;
- Allowance and maintenance.

If they have had no issue born alive, but the deceased leaves issue by another marriage,

Husband surviving takes:	Wife surviving takes:
One-half of wife's real estate for life;	One-third of husband's real estate for life;
One-half of her personal estate absolutely;	One-third of his personal estate absolutely;
	Allowance and maintenance;
or, in assumed values,	or, in assumed values,
$5,000 of real estate for life;	$3,333.33 real estate for life;
$5,000 of personal estate absolutely;	$3,333.33 absolutely;
	Allowance and maintenance.

A widow has no right of dower in wild lands of which her husband dies seized, except wood-lots or other lands used with his farm or dwelling-house, nor in such lands conveyed by him though afterwards cleared.[1] The lands of which a widow is thus not dowable, are such tracts of uncultivated or otherwise unimproved land as are held separate and distinct from houses and from cultivated lands and other improved estate; and they are not subject to dower, because they do not yield any annual income or advantage, and the widow could derive no beneficial use except by committing waste, as, for instance, by cutting off the growing timber.[2]

When a widow is entitled to dower or other interest in the real estate of her deceased husband, she may, without having her interest assigned, continue to occupy such lands with the heirs or devisees of the deceased, or receive her share of the rents or

[1] P. S., ch. 124, § 4. [2] Conner *v.* Shepherd, 15 Mass. 164; White *v.* Cutler, 17 Pick. 248.

profits thereof, so long as the heirs or devisees do not object. She may at any time on petition have her interest set off to her in severalty.[1]

DISPOSAL OF PROPERTY BY WILL.

The husband can dispose of all his property by will as he pleases, except that, if the widow is not satisfied with the provisions made for her, she can waive all the provisions for her benefit in the will; and she will instead thereof become entitled substantially to the same portions of his real and personal estate as she would have been entitled to if her husband had died without making a will, except, however, that, if her share of personal estate would thus exceed ten thousand dollars, she shall receive as her own absolutely but ten thousand dollars, and only the income during her life of the excess above that sum. Such waiver of her husband's will may be made by the wife at any time within six months of the probate of the will, and, if she is insane, may be made by her guardian.[2]

The will of a married woman, on the other hand, although it will be effectual to pass all her real and personal property, if made with her husband's assent expressed in writing during the lifetime of the wife, cannot, unless she has been deserted by him or is living apart from him for a justifiable cause, without such assent, operate to deprive him, surviving, of more than half of her personal property; nor if they have had issue born alive deprive him of his

[1] P. S., ch. 124, §§ 13, 10. [2] P. S., ch. 127, § 18; ch. 139, § 36.

right as tenant by the curtesy to the use and income for his life of her real estate.[1]

The husband, having thus assented to his wife's will, cannot, it would seem, afterwards affect its provisions. There is no statute under which the husband can secure the wife's assent to his will so as in like manner to compel her acceptance of its provisions after his death.

The marriage of a woman is held to be a revocation of her will previously made, or at least a suspension of it, a point about which there is some doubt. On the other hand, marriage alone of a man will not have that effect; though marriage and the birth of a child, even though it be posthumous, will be an entire revocation of a previous will. It seems, however, that, when the facts upon which such revocation is implied, have been contemplated and provided for in the will, the will is not revoked.[2]

MARRIAGE CONTRACTS.

It should be added to the preceding that parties contemplating marriage may, by contract executed before the marriage and recorded in the registry of deeds, make any arrangement regarding the property then possessed by either, both as to its enjoyment during marriage and its disposition after the death of either. Power is given to a female minor to make such a contract at the age of eighteen, in

[1] P. S., ch. 147, § 6; Statutes of 1884, ch. 301; Silsby *v.* Bullock, 10 Allen, 94; Smith *v.* Sweet, 1 Cush. 470. [2] Shaw, C. J., in Warner *v.* Beach, 4 Gray, 162. See also Schouler on Husband and Wife §§ 457, 442.

connection with her guardian. If such contract is not recorded, it will still be binding upon the husband and wife and their respective heirs and executors or administrators, but it will be void as against creditors and all others whose rights would be affected by it.[1] An agreement made by the husband and wife before marriage, which relates only to the rights which the survivor may claim in the estate of the other after the marriage is terminated by death, will be valid, though not recorded.[2]

RIGHTS OF BURIAL.

A recent ruling of one of the courts, that a widow was not entitled to the right of burial in her late husband's tomb, was dwelt upon and repeatedly cited as a case of great hardship toward women. The widow's right in the tomb of her late husband was the same as in any other real estate which belonged to him. All interest in the tomb would go to his heirs at her death, unless he should die without leaving issue, in which case she might, perhaps, have the tomb set off to her absolutely at his death, as part of her five thousand dollar interest in his real estate, a privilege of which he could not deprive her by will. On the other hand, a husband's right in a tomb which belonged to his deceased wife would be substantially the same, except that she might so dispose of it by will that her devisees might have the entire right to it after his death.

[1] P. S., ch. 147, §§ 26–28. [2] Jenkins *v.* Holt, 109 Mass. 261. P. S., ch. 124, §§ 7, 8.

To relieve this alleged hardship, a statute was passed, providing that a wife should have the right to be interred in any burial-lot or tomb which her husband possessed at any time during their marriage, if she had not distinctly released such right.[1] An amendment which was sought to be incorporated in the statute, giving the husband a like privilege of burial in a lot or tomb belonging to the wife, was rejected.

While there can be no property in a dead body, it is the legal right as well as duty of the husband, and not of the next of kin, to dispose suitably by burial of the body of his deceased wife.[2] The wife, undoubtedly, has the same right over the body of her deceased husband, though without a similar legal duty toward it.

EFFECTS OF SEPARATION AND DIVORCE.

If a husband has absented himself from the Commonwealth, and abandoned his wife, or has been sentenced to confinement in the state prison, the court may authorize her, as if she were unmarried, to use and sell all her real and personal property and all which came to her husband through marriage with her.[3] The statute to this effect was originally passed before the wife could make a deed of her real estate without her husband's assent, and it is an undetermined question whether it would enable the wife to convey her real estate free from

[1] Statute of 1883, ch. 262. [2] Weld *v.* Walker, 130 Mass. 422; Durell *v.* Hayward, 9 Gray, 248. [3] P. S., ch. 147, § 31.

the husband's right of curtesy. A statute has recently been passed providing that, if a wife has been deserted by her husband, or is living apart from him for a justifiable cause, she may, after a decree of the court setting forth the fact of such desertion or living apart, make a will the same as if she were sole, and, without her husband's assent, by such will or, under the same circumstances, by deed dispose of all her real and personal estate.[1] Certainly, there is no statute enabling a husband to convey his real estate free from the wife's right of dower.

It is especially provided that when a married woman comes from another state or country into this Commonwealth without her husband, he never having lived with her here, she is not only given the powers and rights bestowed by our laws upon married women, but she may dispose of her property which may be found here in like manner as if she were unmarried.[2] So when a husband and wife, married in another state or country, come into this Commonwealth, either at the same time or at different times, and reside here as husband and wife, the wife retains all property she had acquired under the laws of any other state or country, or by any marriage contract or settlement made outside of the Commonwealth; and, upon so residing together here, their subsequent rights and liabilities are the same as if they had married at the time of their coming here.[3] The absence of similar provisions

[1] Statutes of 1884, ch. 301. [2] P. S., ch. 147, § 29. [3] P. S., ch. 147, § 30.

in favor of the husband would seem to give under the same circumstances some considerable advantages to married women over their husbands.

During the imprisonment of her husband, and during the six months or more of interval after a divorce is granted and before it is made absolute, a wife is endowed with most of the powers to act belonging to an unmarried woman. After an absolute divorce, a woman is, in general, to all legal intents and purposes, single; and the divorced husband and wife may contract with each other as if they had never been married.[1]

Upon a divorce for any cause except adultery of the wife, the wife will hold all her real estate as if her husband were dead, and the court may compel him to restore to her the whole or any part of the personal estate which has come to him by reason of their marriage, or to give her money in place of such personal estate.[2] If divorce is decreed for the wife's adultery, her title to her estate will not be affected during her life, except that the court may decree to the husband so much as it may deem necessary for the support of any minor children given to his custody; and, if she afterwards marry, all his further interest in her estate ceases after her death.[3] The wife will not after divorce have dower in her husband's estate, except in case the divorce was decreed for his adultery or sentence to confinement at hard labor.[4]

[1] Chapin *v.* Chapin, 135 Mass. 393. [2] P. S., ch. 146, §§ 24–26. [3] P. S., ch. 146, § 27. [4] P. S., ch. 146, § 28.

IV. PERSONAL RIGHTS AND OBLIGATIONS.

HUSBAND'S AUTHORITY OVER WIFE.

The authority which the common law gave the husband over the person of the wife so long as they lived together, has not been directly abridged by statute, and it is difficult to determine now to what extent he can legally control her actions. By the old law, he might give her moderate correction; for, as he was held to answer for her misbehavior, "the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement in the same moderation that a man is allowed to correct his apprentices or children." Blackstone adds also: "In the politer reign of Charles II., this power of correction began to be doubted; and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege."[1]

In a recent case in this Commonwealth, it was declared that beating or striking a wife violently with the open hand, is not one of the rights conferred on a husband by their marriage, even if the wife be drunk or insolent.[2]

[1] I Blackstone, 444. [2] Comm. *v.* McAfee, 108 Mass. 458, 461.

The husband is certainly to be regarded as the head of the family. He can fix their place of residence and regulate the household; and some of the authorities intimate that he may exercise a gentle restraint over the person of his wife, without however defining what such "gentle restraint" is. He certainly may use such reasonable force as may be necessary to prevent her from using their domicile for an illegal purpose.[1] In order to protect herself, she can upon complaint, in case of ill-usage or cruelty, procure an indictment for assault to be brought against him; and, if the danger of personal violence be sufficient to justify it, she can cause him to give bonds to keep the peace.[2] The court may, on the wife's petition, prohibit the husband from imposing any restraint upon her personal liberty during the pendency of a libel for divorce,[3] or when he fails to furnish her a suitable support, or has deserted her, or when for justifiable cause she is living apart from him;[4] and, upon his conviction for assault upon her, he may further be required to give bonds to keep the peace.[5]

HUSBAND'S OBLIGATION FOR MAINTENANCE OF WIFE.

The statutes, in relieving the disabilities of the wife, have not lessened the duties and liabilities of the husband. He is obliged to support the family. He is bound to maintain the wife, and provide for her in a manner suitable to his situation and con-

[1] Comm. *v.* Wood, 97 Mass. 225, 228; Comm. *v.* Carroll, 124 Mass. 30, 31. [2] P. S., ch. 211. [3] P. S., ch. 146, § 16. [4] P. S., ch. 147, § 33. [5] P. S., ch. 215, § 9.

dition in life, although she has property of her own; and he will, in general, be held liable for all ordinary contracts and purchases made by her in his name, unless it is shown that he has expressly forbidden others to supply her on his account. Even then, he cannot prevent her from charging him with reasonable necessary expenses, not only for her own support, but also for that of such of their children as may be living with her.[1]

If the husband and wife separate by mutual consent, or the wife lives apart from her husband, and no condition or agreement is made that she shall support herself, she not having the means of support and no proper provision being made therefor, if he abandons her, if he drives her from his home without justifiable cause, or if he so conducts himself that she is justified in leaving him by reason of his adultery, his violence, or his cruelty, she will carry his credit with her for necessaries for herself and family. Even in case a suit for divorce is pending, the husband may be compelled to provide the wife with a suitable support and maintenance, and with money sufficient to maintain or defend the suit. On the other hand, the obligation of the husband to maintain his wife ceases, if she wantonly forsakes or without justifiable cause abandons him, or rejects the proper provision he has made for her maintenance, or if by her adultery or otherwise he is justified in withdrawing from her society.[2]

[1] Eames *v.* Sweetser, 101 Mass. 78; Raynes *v.* Bennett, 114 Mass. 424. [2] Alley *v.* Winn, 134 Mass. 77; Mayhew *v.* Thayer, 8 Gray, 172; Camerlin *v.* Palmer Co., 10 Allen, 539; 1 Dane's Abr., 355; P. S., ch. 146, §§ 11, 15.

As a general rule, the term, "necessaries," as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility as are suitable to maintain her according to the estate and degree of her husband.[1] The term also includes supplies furnished to the wife when she is sick, insensible, or insane, and the reasonable expenses of her funeral and burial after death; and no notice is necessary in order so to charge him.[2] Under the general statement "that whatever naturally and reasonably tends to relieve distress, or materially and in some essential particular to promote comfort, either of body or mind, may be deemed to be a necessary, for which a wife, under proper circumstances, may pledge her husband's credit," it was held that a husband is liable for legal services rendered the wife for successfully defending her upon a complaint against her for being a common drunkard, instituted by him.[3]

It seems there is no obligation on the part of the wife to support her husband, even though he be a pauper and she be possessed of abundant property.

HUSBAND'S LIABILITY FOR WIFE'S CRIMINAL AND ILLEGAL ACTS.

If a wife commits one of the legal offences, or lighter crimes, such as assault and battery, theft or burglary, in the presence of her husband, or so

[1] Raynes *v.* Bennett, 114 Mass. 424, 429. [2] Cunningham *v.* Reardon, 98 Mass. 538. [3] Conant *v.* Burnham, 133 Mass. 503, 505.

near to him as to be within his immediate influence and control, she is presumed, in the absence of evidence to the contrary, to act under his coercion, and will be acquitted on the ground of his power to regulate the household, and her duty to obey her husband's commands; and he alone will be regarded and punishable as the guilty party.[1] If a wife, for instance, sells intoxicating liquors in violation of law, the husband will be punishable if the sales are made in his presence, though the house in which they are made is owned or hired by her, and not by him, and he has no interest in the business or its profits.[2] Even the fact that the wife has filed a certificate of carrying on the business on her separate account, in accordance with the statute, does not release the husband from his liability.[3]

In order to render the husband punishable, instead of the wife, for her act, he must be legally present at the time of the act. To establish the fact of such presence, it does not seem to be necessary to show that the offence was literally committed in his sight. If she is near enough to be under his immediate influence and control, though not in the same room, it is sufficient.[4]

Cases may, of course, occur, in which both husband and wife may be convicted of such an offence.[5] There are also exceptions to the above rule, in the case, for instance, of certain offences in which the

[1] Comm. *v.* Neal, 10 Mass. 152; Comm. *v.* Eagan, 103 Mass. 71; Comm. *v.* Wood, 97 Mass. 225, 228. [2] Comm. *v.* Carroll, 124 Mass. 30, 31; Comm. *v.* Pratt, 126 Mass. 462, 463. [3] Comm. *v.* Barry, 115 Mass. 146, 148. [4] Comm. *v.* Munsey, 112 Mass. 287, 289. [5] Comm. *v.* Tryon, 99 Mass. 442.

wife, rather than the husband, must be presumed to be the guilty party; and she will be punished either alone or jointly with her husband.[1] The presence of the husband is no defence to the wife in crimes which are forbidden by the law of nature, as murder and manslaughter.[2]

The husband is liable in many cases for torts and trespasses of the wife, if done in his presence, it being in like manner presumed that she acted under his influence or control.[3]

The presumption that the wife in committing crime or doing other illegal acts in presence of the husband, acted under his coercion, may be overcome by showing that in fact she acted without his permission or coercion.[4]

If a wife in the absence of her husband perform illegal or criminal acts, the fact that she acted in obedience to his orders will be no defence as to her, but such direction or instigation would frequently seem to render the doings in law his acts as well as hers, and make him also amenable.[5]

The recent statutes enlarging the rights and privileges of married women in this Commonwealth, have not relieved the husband from his responsibility for his wife's criminal and illegal actions.[6]

[1] Comm. *v.* Hayes, 114 Mass. 281; Comm. *v.* Lewis, 1 Met. 151. [2] Comm. *v.* Neal, 10 Mass. 152. [3] Handy *v.* Foley, 121 Mass. 259. [4] Comm. *v.* Pratt, 126 Mass. 462, 463. [5] Handy *v.* Foley, 121 Mass. 259. [6] Comm. *v.* Gannon, 97 Mass. 547; Comm. *v.* Carroll, 124 Mass. 30.

RIGHTS OF HUSBAND AND WIFE AS TO TESTIFYING REGARDING EACH OTHER.

The husband and wife are not allowed to testify as to private conversations with each other. This prohibition includes conversations on subjects which are not confidential in their nature; but abusive language addressed by one to the other when not in conversation may be testified to. Neither husband nor wife can be compelled to be a witness in a trial in any criminal proceeding against the other.[1] These provisions must evidently be regarded as necessary so long as the generally accepted theory of the marriage relation is sustained.

RIGHTS TO DIVORCE.

The wife can obtain divorce for adultery, impotency, extreme cruelty, utter desertion for three successive years, gross and confirmed habits of intoxication, or cruel and abusive treatment on the part of the husband, or in case of his confinement at hard labor for five or more years in jail, house of correction, or prison; and also if he, being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable maintenance for her. The same opportunities for divorce are given to the husband, except the right to divorce for neglect of maintenance. Divorce may also be decreed when either party has separated from the other without his or her consent, and united with a religious sect

[1] P. S., ch. 169, §18; Dexter *v.* Booth, 2 Allen, 559; French *v.* French, 14 Gray, 186.

or society that professes to believe the relation of husband and wife void or unlawful, and has continued united with such sect or society for three years, refusing during that term to cohabit with the other party.[1]

RIGHTS TO CARE AND CUSTODY OF CHILDREN.

The husband is entitled, while the two are living together, and after the death of the wife, if competent to transact his own business, to the custody of the children and the care of their education until they reach majority, which power enables him to control their residence, occupation, employment, and instruction, and gives him the right to their earnings. The wife, on the death of the husband, is in like manner entitled to the custody of the children and the care of their education, with the same powers, it seems, as are given the husband. The rights of either to the care and custody of the children may be lost by misconduct or inability to provide properly for their necessities.[2]

When the parents live separately, or when proceedings for divorce have been begun, or divorce has been granted, or when one of the parents, having the obligation, fails without good cause to furnish suitable support, the court may make decree concerning the custody, care, maintenance, and education of the children as seems expedient for their interests; and, in the absence of misconduct on the

[1] P. S., ch. 146, §§ 1, 2. [2] P. S., 139, § 4; Clapp *v.* Green, 10 Met. 439.

part of either, the rights of the parents are to be held equal, and the happiness and welfare of the children are alone to determine in whose custody they shall be placed.[1]

If the Probate Court finds the parents unfit to retain the custody of the children, or if it finds one of the parents so unfit, and the other parent consents thereto, it may give the custody of the children to a guardian by it appointed.[2]

GUARDIANSHIP OF CHILDREN.

Neither husband nor wife, as parent, would have the right to, or control of property coming to children by gift, bequest, or devise; but the Probate Court may appoint a guardian, who shall have the care and management of all such property.[3] Power is, however, given to the father to appoint by will a guardian who shall have, after the death of the father, the same powers and duties with regard to the person and estate of the ward as a guardian appointed by the court. The same power of appointment is given to the mother in case the father dies without exercising such power.[4]

The marriage of a female minor deprives her parents or guardian, as the case may be, of all right to her custody or education, but does not deprive the guardian of his power over her property.[5] When a married woman owns property, a guardian may be

[1] P. S., ch. 146, §§ 29, 32; ch. 147, §§ 33, 36; Dumain *v.* Gwynne, 10 Allen, 270. [2] P. S., ch. 139, § 4. [3] P. S., ch. 139, § 4. [4] P. S., ch. 139, § 5. [5] P. S., ch. 139, § 41; Bartlett *v.* Cowles, 15 Gray, 445.

appointed for her, on notice to her husband, for the same causes as for a single woman; but such guardian will not be entitled to the care, custody, or education of his ward, except in case of the insanity of her husband, or in case her husband abandons her by absenting himself from the Commonwealth and making no sufficient provision for her. Her guardian cannot apply her property to her maintenance, or to that of her family, while she is married, unless he is authorized so to do by the court, on account of the husband's inability to furnish such suitable maintenance or for other good cause.[1]

RIGHTS TO PROPERTY OF CHILDREN.

Property belonging to children of whatever age dying unmarried and without issue, descends in equal parts to the father and mother, and, in case one has died, then wholly to the other.[2]

An illegitimate child will be entitled, to the same extent as other children, to take the property of his mother at her decease; and, if an illegitimate child dies without a will and without issue, his mother, if living, will take his estate.[3]

OBLIGATION FOR MAINTENANCE OF CHILDREN.

The father is, if able, obliged to support and maintain the children in a suitable manner during their minority, even though they have property of their own. At his death, the mother, it seems, is in gen-

[1] P. S., ch. 139, §§ 13–15. [2] P. S., ch. 125, § 1; ch. 135, § 3.
[3] P. S., ch. 125, §§ 3, 4.

eral bound to support the children only in case she has sufficient means for the purpose and the children have no property of their own ;[1] if they have property, she can charge them for the cost of their support above their earnings, though they live with her.[2] Only in case the father has little or no property, or the children have sufficient for their maintenance and education in a manner more expensive than their father can reasonably afford, will he be allowed by the Probate Court to draw from their funds for their maintenance or education.[3]

A husband is, in general, not bound to support the children of his wife by a former marriage ;[4] but the Supreme Court has held that a husband who receives into his family such children, has, in the absence of any agreement or circumstances indicating a different arrangement, not only a right to their services, but is liable for their support and education.[5]

[1] Dawes *v.* Howard, Parson, C. J., 4 Mass. 97, 98. [2] Whipple *v.* Dow, 2 Mass. 415. [3] P. S., ch. 139, § 32. [4] Cole *v.* Eaton, 8 Cush. 587. [5] Mulhern *v.* McDavitt, 16 Gray, 404.

V. GENERAL SUMMARY AND CONCLUSIONS.

Such are the differences which the law of Massachusetts makes between men and women. The differences are still considerable, though the changes which have been wrought in the direction of equality of rights, particularly in property, during recent years have been many and great. If now, or certainly after a few further changes, the advantages which men have under the law over women, were to be weighed against the advantages which women possess over men, it would be a mooted question as to which side would turn the scales.

There remains still, probably, the presumption that the personal property in the possession of the wife belongs to the husband. The wife has not, under ordinary circumstances, as much power in conveying away her real estate as the husband has in conveying his. A wife has not in most cases as great a share in her husband's estate upon his death, as a husband has in his wife's estate at her death. Nor are their powers to leave property by will to others quite equal. Perhaps there is hardly any logical reason, after the changes already made, for not making a substantial equality in these respects.

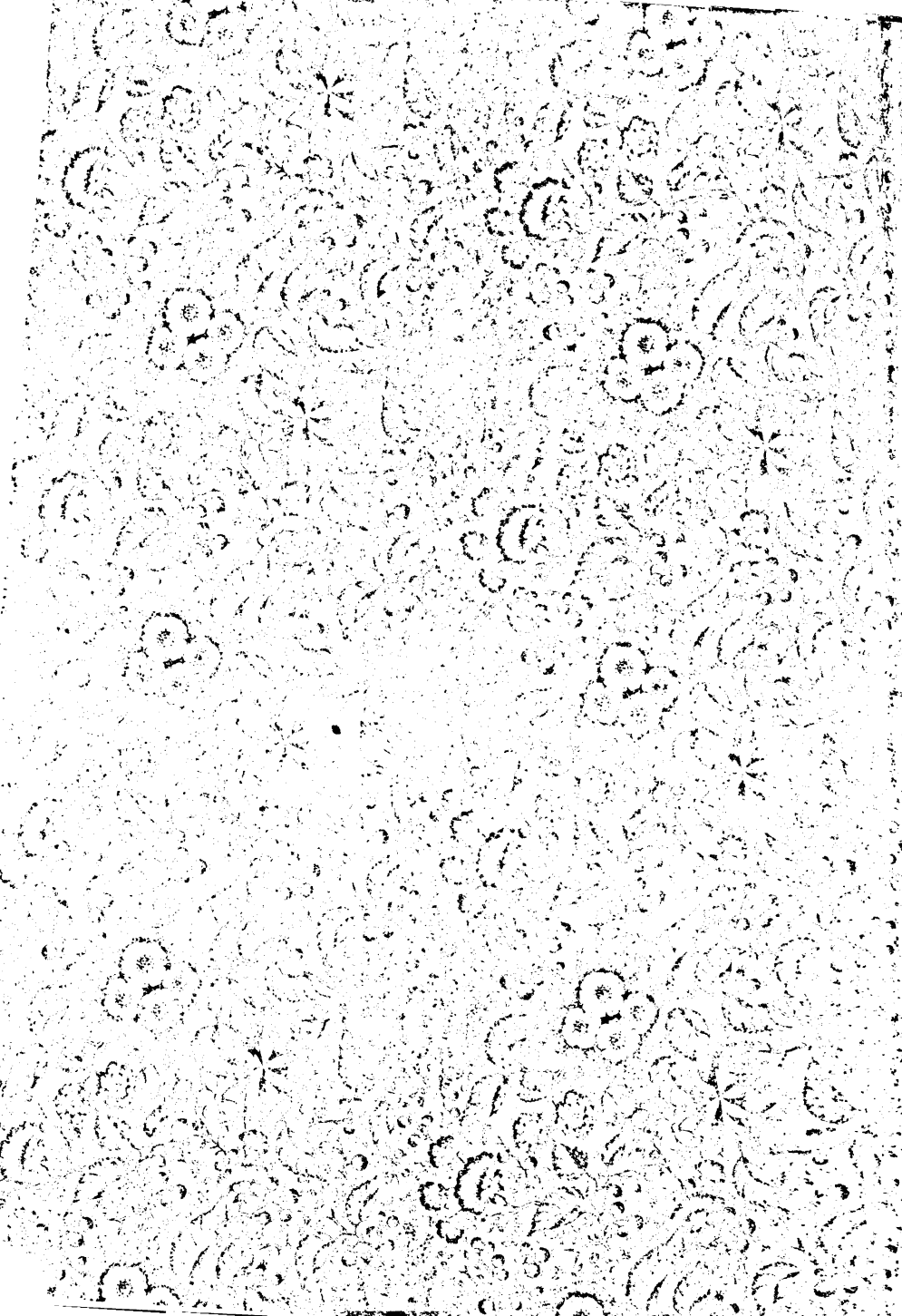
There are reasons why the husband and wife should not make conveyances of real estate directly to each other, and there are stronger reasons against

rendering it easier for them to make gifts of personal property to each other, on account of the greater facilities which would be thus offered for defrauding creditors; but in this latter respect, in the ability to receive gifts, the wife is treated more liberally under the law than the husband.

The changes suggested would render it proper to make the husband's and the wife's property equally chargeable with the support of their children, and to cause the children's earnings to contribute to the source from which their maintenance is drawn. The withdrawal from the husband of whatever legal powers of correction and restraint he may have over the wife should relieve him from all responsibility, as husband, for her tortious and criminal acts. The husband's liability to support the wife, and the want of any obligation on the part of the wife to support the husband, remaining unchanged, his natural position in the family should entitle him, rather than her, to fix their domicile, and permit him to retain a certain headship in the family.

There would then remain many greater or smaller privileges in favor of women, such as certain exemptions from taxation, certain advantages in settlements, in naturalization, in the matter of arrest, of life insurance, of rights of homestead and of burial, of receiving gifts from the husband, and of holding property after divorce and upon coming to and residing in the Commonwealth without the husband, and in the matter of the widow's allowance.

The direct power given to men in the making of

laws and the naming of law-makers is still offset by or united with their responsibility in enforcing the laws, but whether properly or not involves political and social considerations not to be discussed here.

It is readily seen that the statutes fixing the legal status of women in this Commonwealth do not make a logical, well-considered, and well-balanced system, but rather, as has been before intimated, a fabric in which the original groundwork has almost disappeared from sight under the constant amending which has been going on for many years. The theory of the common law has thus been almost entirely overthrown by statute. But laws in relation to any subject, which are the result of a changing public sentiment, will naturally and necessarily be a complicated growth and never become a finished code; and they will present inconsistencies and imperfections, so long as inconsistency and error are found in public opinion. Not infrequently, new defects and evils, greater or less, arise in the overthrowing of old systems for the purpose of remedying past abuses and injustice. Putting aside, however, the disputed question of suffrage, should the few further changes suggested be made, as now seems likely soon to be done, we should be much nearer the truth than was Blackstone a century ago in speaking of the common law, to say with a similar degree of pride of the statutes of this Commonwealth, "so great a favorite is the female sex of the laws" of Massachusetts.